Supreme Court, U.S.
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No. 86-1517

In the Supreme Court of the United States

October Term, 1986

GARY SCHOOLER,
Petitioner,

vs.

ROBERT HARDER, Secretary of Social and Rehabilitation Services, and KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States

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Attorney for Respondent

QUESTIONS PRESENTED

1. Does the Due Process clause of the Fourteenth Amendment require the State of Kansas to allow its tenured employees to confront and cross-examine witnesses before termination when the State has a procedure which allows a full evidentiary post-termination hearing pursuant to K.S.A. 75-2929d?

2. Does the Due Process clause of the Fourteenth Amendment require the State of Kansas to tender the names of all witnesses to a tenured employee at a pre-termination hearing when the State has a procedure which requires that the employee be given the names and a summary of anticipated testimony of all witnesses prior to the post-termination hearing?

3. Does the Due Process clause of the Fourteenth Amendment require the State of Kansas to afford its tenured employees an impartial decision-maker at the pre-termination hearing when the State's procedure grants the employee an evidentiary, post-termination hearing before an impartial board appointed by the State's Governor?

4. Does a five-day advance notice of a pre-termination hearing, together with a statutory right pursuant to K.S.A. 75-2949(c) to request a delay if the circumstances warrant, give sufficient notice under the Due Process clause of the Fourteenth Amendment when the employee also is entitled to a full evidentiary post-termination hearing?

5. Does a pre-termination notice of proposed dismissal, which sets forth a list of individuals, by title, with whom a State employee has failed to cooperate and sets forth the precise text of a statement made said employee, evidencing his intent to disrupt normal operation of the agency, gives sufficient notice of the reasons for his proposed dismissal under the requirements of the Due Process clause of the Fourteenth Amendment.

6. Where a terminated public employee is provided the names of adverse witnesses and a description of their expected testimony seven (7) weeks prior to his post-termination hearing, are the Due Process requirements of notice and opportunity satisfied?

III

PARTIES TO THE PROCEEDING

All the parties to this proceeding are listed in the caption of the case in this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
PARTIES TO THE PROCEEDING III
TABLE OF AUTHORITIES IV
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR DENYING THE WRIT 10
CONCLUSION 14
APPENDIX TABLE OF CONTENTS ..... AI

TABLE OF AUTHORITIES

Cases:

Bell v. Burson, 470 U.S. 532, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) 12

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 84 L.Ed.2d 494 (1985) 10, 11, 12, 13, 14

DeSarno v. Department of Commerce, 761 F.2d 657 (Fed.Cir. 1985) 14

Miller v. City of Mission, Kansas, 705 F.2d 368 (10th Cir. 1983) 11

Walker v. United States, 744 F.2d 67 (10th Cir. 1984) ... 11

Statutes:

K.S.A. 2949 ..... A29

K.S.A. 2929d A33

K.S.A. 2929e A36

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ROBERT HARDER, Secretary of Social and Rehabilitation Services, and KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States

The Respondents, Robert Harder and Kansas Department of Social and Rehalilitation Services, respectfully pray that a Writ of Ceritorari be denied for review of the judgment and opinion of the Court of Appeals of the State of Kansas entered in this proceeding on October 16, 1986.

OPINIONS BELOW

There are no official or unofficial reports of any opinions delivered in the courts or administrative agencies below. However, the nonpublished decisions of the District Court of Shawnee County, Kansas, the per curiam affirmance of such decision without opinion by the Kansas Court of Appeals, and the

denial of Petition for Review by the Supreme Court of the State of Kansas are appended hereto. The opinion of the District Court of Shawnee County, Kansas, dated December 5, 1985, is appended as Appendix C, the per curiam affirmance of the Court of Appeals of the State of Kansas, dated October 16, 1986, is appended hereto as Appendix B, and the denial of the Petition for Review by the Kansas Supreme Court, dated December 18, 1986, is appended hereto as Appendix A. The decision of the Kansas Civil Service Board and Denial of Rehearing are appended hereto at Appendix E and D, respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which is set forth in the Petitioner's Petition.

Additionally, the case involves provisions of the Kansas Statutes Annotated contained in K.S.A. 75-2949, which is reproduced at Appendix I; K.S.A. 75-2929d, which is reproduced at Appendix J; and K.S.A. 75-2929e, which is reproduced at Appendix K.

STATEMENT OF THE CASE

1. The Petitioner began his employment with the Youth Center at Atchison (a state operated facility for adjudicated youths) in August or September of 1972. At the time of termination he was a head cottage parent. (R.Vol.Two, TRV-p.59[1]).

2. Beginning in 1980, a number of meetings were held between Petitioner and his supervisors concerning Petitioner's poor relationship with other staff members. (R.Vol.Two, TRV-p.203, TRII-p. 450). Petitioner's immediate supervisor received more complaints about Petitioner than any other cottage parent and spent a great deal of time counseling Petitioner. (R.Vol.Two, TRII-pp.404-405).

3. In Mid-August of 1984, the Superintendent of the Youth Center at Atchison submitted a proposal to all cottage staff concerning periodic staff transfers. (R.Vol.Two, TRII-p.390).

4. On August 20, 1984, Petitioner called Loval Vigola, another Youth Center at Atchison employee, and ask her to have her staff call the Youth Center at Topeka seeking lateral transfers. The lateral transfer request calls were apparently designed to generate executive inquiries to the Superintendent of the Youth Center at Atchison. (R.Vol.Two, TRI-pp. 122-123).

5. At the cottage staff meeting on August 21, 1984, Petitioner presented his staff the telephone

1 "TR" refers to the transcript of Petitioner's Kansas Civil Service hearing. The transcript is included in the record on appeal to the Kansas Court of Appeals.

number of the Youth Center at Topeka and indicated that he doubted the staff transfer proposal would be put into effect if enough people called the Youth Center at Topeka for transfers. (R.Vol.Two, TRI-p.67).

6. On August 28, 1984, Loval Vigola informed the Superintendent oof the Youth Center at Atchison and the Petitioner's immediate supervisor of the substance of the Petitioner's call. (R.Vol.Two, TRI-p. 128, TRII-pp.390, 437).

7. On August 28, 1984, the personnel officer at the Youth Center at Atchison called the Youth Center at Topeka to discover whether requests for lateral transfers had been made. The personnel officer at the Youth Center at Topeka indicated that several calls requesting lateral transfer had been received from employees of the Youth Center at Atchison, including a call from Petitioner. (R.Vol.Two, TRI-pp.24, 384, 385).

8. On August 28, 1984, Petitioner's immediate supervisor attempted to talk to Petitioner twice about his involvement in the requests for lateral transfers. On each occasion Petitioner denied any involvement. (R.Vol.Two, TRII-pp391, 392).

9. In reaching the decision to dismiss Petitioner, the Superintendent of the Youth Center at Atchison considered Petitioner's poor relationships with certain staff, Petitioner's involvement in the lateral transfer movement and Petitioner's evaluations. (R.Vol.Two, TRII-pp.431-441).

10. On August 29, 1984, the Superintendent of the Youth Center at Atchison proposed Petitioner's dismissal by letter. (R.Vol.One, pp.1-2). The letter read as follows:

August 29, 1984

Gary Schooler
Youth Service Worker V
Sycamore Cottage
Youth Center at Atchison

Dear Mr. Schooler:

The purpose of this letter is to notify you of your proposed dismissal from your employment with the State of Kansas as a Youth Service Worker V with the Youth Center at Atchison. This proposed dismissal is in accordance with Kansas Personnel Regulation 1-10-6. The proposed effective date of this dismissal will be Wednesday, September 5, 1984.

The reasons for your proposed dismissal are as follows:

1. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidenced by your continued and pervasive unwillingness to cooperate with staff including, but not limited to, the following: KSA 75-2949a (4)

   Director of Training and Staff Development, YCAA
   Program Director, YCAA
   Director of Youth Services, YCAA

Director of Education, YCAA
Chief Psychologist, YCAA
Chief Social Worker, YCAA
Other Youth Service Workers

2. Participation in a deliberate action that would seriously disrupt or disturb the normal operation of the Youth Center at Atchison as attested to by another Youth Service Worker in the following statement: KSA 75-2949b (6)

> "Of my own personal knowledge, I received a phone call at my residence on the late afternoon of August 20th. This call came from Mr. Schooler, he was informing me that we were being transferred on September 18th.*
>
> At that time he said he was asking his staff and Glenice (Schooler, spouse of Mr. Schooler) was asking her staff to call YCAT asking for lateral transfers. He stated that if enough people call that someone will be saying something to Gene (Supt. Wilson). Then maybe the word will get to Coates and he will attempt to find out what is going on up here."
>
> *Apparently referring to a Draft Proposal entitled "Universal Staff Exchange" which was submitted to all HYSW's for their response and evaluation.

3. Personal conduct detrimental to state service which could cause undue disruption of

work and endanger the safety of other staff and students. KSA 75-2949b (16)

This proposed dismissal is being initiated in accordance with Article 75-2949 of the Kansas Civil Service Act which states that an appointing authority may dismiss any permanent classified employee when the appointing authority considers that the good of the service will be served thereby.

Before a final decision is made on the proposed dismissal, you have the opportunity to appear before me or respond in writing, or both, concerning your proposed dismissal. This opportunity for you to reply and/or appear shall be at the Superintendent's Office on Tuesday, September 4, 1984, at 8 AM, at which time you may present your reasons or explanations as to why your dismissal should not take place. You will be notified as to my decision on the issue of the proposed dismissal on or before Tuesday, September 4, 1984, by 5 PM.

Upon receipt of this letter of proposed dismissal you are hereby placed on leave without pay and relieved of your employment duties' until the conclusion of all action relative to your proposed dismissal.

Sincerely yours,

/s/
Mark S. Phelps
Superintendent

MSP:vj
cc: State Division of Personnel Services

Director, SRS Division of Personnel Services
Personnel File
Director Nye

I acknowledge receipt of this letter on 8/29/84.

(signed)

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11. Petitioner appeared before the Superintendent on September 4, 1984 with an employee counselor and presented a written response to his proposed dismissal. (R.Vol.Two, TRV-p.92, TRII-p.447).

August 30, 1984

Mr. Mark Phelps
Superintendent
Youth Center at Atchison
Atchison, Kansas 66002

Superintendent Phelps:

I am taking the opportunity to respond in writing, as well as meeting with you on Tuesday, 9-4-84, to the charges leveled against me or reasons for the proposed dismissal.

The first reason listed states:

"for failing to maintain satisfactory and harmonious relationships with fellow and supervisory employees."

Please note that this aspect of my job duties is covered by my DA 229, and has been for the past 20 months and more. This has been evaluated by

Mr. Nye, Dr. Kearns, and yourself as "satisfactory" on my DA 228.

The exception to this is my evaluation of this relationship with only yourself, Dr. Kearns (Program Director), and Mr. Nye (Director of Youth Services). In this circumstance, my relationship is and has been for the past 20 months, one of defense for the sake of job survival in an atmosphere of harassment and humiliation to accomplish a constructed dismissal.

The second reason listed states:

"for participation in a deliberate action with the intent of disrupting or disturbing the normal operations of the Youth Center at Atchison."

To substantiate this charge, you offer an unsubstantiated statement, which was supposed to have been made by another youth service worker. Whether this statement was made by malicious intent or otherwise, this is a mis-quote of any conversation I had with anyone, concerning the matter of the Universal Staff Exchange proposal.

I never stated to anyone, any intent to solicit youth service workers to call the Youth Center at Topeka, nor have I done so.

Please see Secretary's Letter 421, which makes available to me, a way to resist these type of policies.

Gary Schooler
Youth Service Worker
V
/s/

12. Petitioner was dismissed effective September 5, 1984 and appealed his dismissal to the Civil Service Board on September 27, 1984. (R.Vol.One, pp.3, 4, 5).

13. The Youth Center at Atchison provided Petitioner with "Factual Basis and Expected Witnesses List" on November 14, 1984. (R.Vol.One, pp.32-34).

14. After a five-day hearing, the Civil Service Board upheld Petitioner's dismissal and later denied his motion for rehearing. (R.Vol.One, pp.67-70, 104).

REASONS FOR DENYING THE WRIT

A government employee with a property right in continued employment has a fundamental due process entitlement to notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 1495 (1985). The nature of the pretermination proceeding or hearing depends, in part, on the nature of subsequent proceedings available to the employee. A full evidentiary hearing prior to termination is not constitutionally mandated.

The requirements that are set forth in *Loudermill* were solidly met by the defendants. Plaintiff received written notice of the charges against him, an explanation of his failure to maintain harmonious relations with certain staff members and an explanation of the facts surrounding his encouragement of employees to seek lateral transfers. In addition, plaintiff was given a time, place and date certain to present his side of

the story prior to any adverse action. In addition to the basic requirements of *Loudermill*, the Petitioner was afforded an opportunity to appear and be represented at a pre-termination hearing.

Contrary to Petitioner's contentions, there is no conflict of authority on settled principles regarding entitlement to a full evidentiary pre-termination hearing. The cases proffered by Petitioner in support of his contention are either misstated or misconstruded. Neither *Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir. 1983) or *Walker v. United States*, 744 F.2d 67 (10th Cir. 1984) established an entitlement to a full evidentiary pre-termination hearing before an impartial tribunal in circumstances where an employee has a post-termination right to hearing before an independent tribunal with the power to reinstate and order back pay.

In *Miller v. City of Mission, Kan., supra*, the public employee was terminated without a pre-termination hearing. Additionally, the same individual who terminated the employee conducted the post-termination hearing and made the ultimate decision denying reinstatement. In this case, the post-termination hearing was conducted by the Kansas Civil Service Board, a body totally independent from the Youth Center at Atchison. The ultimate decision denying reinstatement was made by the same Board.

The public employee in *Walker v. United States, supra* was given a limited pre-termination opportunity to respond to his proposed termination and no post-

termination hearing. In addition, the only decision-maker involved was another management official with Tinker Air Force Base. In contrast, Petitioner herein was given a pre-termination hearing in which he had a right to legal representation and a post-termination hearing before an independent decision-maker where he was represented by an attorney. The post-termination evidentiary hearing lasted five days.

In the context of pre-termination rights, due process merely requires that a meaningful opportunity be given to the employee to tell his side of the story. *Loudermill*, 470 U.S. 532 at 547. The risk of error is reduced by the fact that the pre-termination hearing does not necessarily and definitely settle the propriety of the termination. *Loudermill*, 470 U.S. 532, 545 citing *Bell v. Burson*, 402 U.S. at 540. Indeed, it serves mainly as an initial check against mistaken decisions. *Ibid.*

In light of the post-termination safeguards afforded Petitioner, he was afforded due process at the pre-termination stage. To have required more as this court has observed, would intrude to an unwarranted extent on the state's interest in quickly removing an unsatisfactory employee. *Loudermill* 470 U.S. at 546.

The decision of the Kansas Court of Appeals is manifestly consistent with this Court's decision in *Loudermill, supra.* The Kansas Court of Appeals found that the Petitioner had adequate notice of the reasons of his proposed dismissal. A review of the

letter proposing the Petitioner's dismissal (Appendix H) and the Petitioner's written response thereto (Appendix G) reveals that Petitioner had specific notice and clearly understood those charges. The Petitioner's contention that he had no pre-termination explanation of the evidence against him flies in the face of the record below.

Petitioner claims that five (5) days advance notice of his pre-termination hearing violated due process. The Court below determined that in light of the totality of the process available to the Petitioner, including the post-termination opportunity to present his side of the story, the five (5) day notice was sufficient. The Kansas Court of Appeals decision was consistent with the dictates of due process as set forth by this Court in *Loudermill, supra,* and not in conflict therewith.

Petitioner's contentions of deficiencies in the post-termination hearing are not supported by the facts or the law. A review of the attached Appendix F, which was provided the Petitioner's counsel seven weeks prior to the post-termination hearing, demonstrates that there was no absolute refusal to provide Petitioner with information termination prior to the post-termination hearing.

The Petitioner's motion for a writ should be denied. The Kansas Court of Appeals correctly applied the established principles in the area of due process. Further, there is no conflict between the circuits on the question of the extent and nature of the pre-termi-

nation hearing. The nature of such a hearing is dictated, at least in part, by the post-termination proceedings available. Such proceedings are *not* full blown adversarial proceedings with a right to an impartial hearing officer and the right to cross-examine witnesses. The purpose of a pre-termination hearing is to provide an initial check against a mistaken decision. *Loudermill, supra; DeSarno v. Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

Appendix A — Denial of the Petition for Review by the Kansas Supreme Court ..... A 1

Appendix B — Per curiam affirmance of the Court of Appeals of the State of Kansas ..... A 2

Appendix C — Opinion of the District Court of Shawnee County, Kansas ..... A 3

Appendix D — Denial of Rehearing from the Kansas Civil Service Board A13

Appendix E — Decision of the Kansas Civil Service Board A16

Appendix F — Factual Basis and Expected Witness before the Kansas Civil Service Board A21

Appendix G — Petitioner's written response to proposed dismissal A24

Appendix H — Letter of prososed dismissal A26

Appendix I — K.S.A. 75-2949 ..... A29

Appendix J — K.S.A. 75-2929d A33

Appendix K — K.S.A. 75-2929e A36

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF KANSAS

Gary Schooler	)	
Appellant,	)	
v.	)	No. 86-59073-A
Robert Harder, Secretary SRS,	)	
Kansas Department of SRS,	)	
Appellee.	)	

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,
Lewis C. Carter
Clerk, Supreme Court

Date December 18, 1986

APPENDIX B

NOT DESIGNATED FOR PUBLICATION

No. 59,073

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GARY SCHOOLER,
Appellant,

v.

ROBERT HARDER, Secretary of Social and Rehabilitation Services, Kansas Department of Social and Rehabilitation Services,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; TERRY L. BULLOCK, judge. Opinion filed October 16, 1986. Affirmed.

William E. Metcalf, of Metcalf and Justus, of Topeka, for the appellant.

Deborah Purce Jones, legal division, Department of Social and Rehabilitation Services, of Topeka, for the appellee.

Before MEYER, P.J., WILLIAM D. CLEMENT, District Judge, assigned, and DANIEL L. HEBERT, District Judge, assigned.

PER CURIAM: Affirmed under Rule 7.042 (b) and (d), 235 Kan. lxxiv.

APPENDIX C

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
SIXTH DIVISION

GARY E. SCHOOLER, Plaintiff,	)	
v.	)	Case No. 85CV545
ROBERT HARDER, SECRETARY SRS, KANSAS DEPARTMENT OF SRS, Defendants.	)	

MEMORANDUM DECISION AND ORDER

The above-entitled matter comes before the Court for decision on the plaintiff's petition for review. Plaintiff has appealed from the decision of March 11, 1985, by the Kansas Civil Service Board which found that the plaintiff's termination from employment at the Youth Center at Atchison (YCAA) was reasonable.

STATEMENT OF FACTS

Plaintiff was hired in August or September of 1972 as a Youth Services Worker at the Youth Center at Atchison (YCAA). After 1980, problems arose which lead to joint meetings between the plaintiff and his supervisor. The concern expressed at these meet-

ings was the plaintiff's relationships with other YCAA employees. Robert Nye, plaintiff's immediate supervisor counselled the plaintiff on these problems.

On August 28, 1984, a YCAA employee, Loval Vigola, relayed information to Mark Phelps, the Superintendent of YCAA, that the plaintiff Gary Schooler called her at home on August 20, 1984 to solicit her and other employees to seek lateral transfers to the Youth Center at Topeka (YCAT) apparently in order to generate inquiries as to the administration at YCAA. The personnel officer at YCAA called the personnel officer at YCAT to discover if such request for lateral transfers were made. The office at YCAT stated that several calls requesting transfers were received from YCAA employees on Friday, August 24 and Monday, August 27, 1984. Mr. Nye attempted to talk to the plaintiff twice on August 28, 1984, regarding the plaintiff's involvement in the requests for transfers. The plaintiff denied involvement in the scheme.

On August 29, 1984, the Superintendent of YCAT proposed the termination of the plaintiff. Pursuant to K.S.A. 75-2949, plaintiff was sent a proposed dismissal letter, stating the following reasons for the dismissal:

> "a. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidenced by your continued and pervasive unwillingness to cooperate with staff . . . [here followed a list of YCAA personnel listed by position].

"b. Participation in a deliberate action that would seriously disrupt or disturb the normal operation of the Youth Center at Atchison as attested by another Youth Service Worker in the following statement . . . [here followed a detailed statement from another employee specifically describing the date and content of the alleged conversation with the plaintiff].

"c. Personal conduct detrimental to state service which could cause undue disruption of work and endanger the safety of other staff and students."

The proposed dismissal letter gave the plaintiff an opportunity to respond to the reasons for termination at a pretermination proceeding to be held on September 4, 1984. Plaintiff attended the meeting on September 4 and presented a written response to the allegations in the proposed dismissal letter. After the hearing, the YCAA superintendent dismissed the plaintiff effective the next day. The plaintiff appealed his termination to the Civil Service Board on September 27, 1984. Prior to the Civil Service hearing, the plaintiff filed four summary judgment motions with the Board; all four motions were denied. After five (5) days of hearings, the Civil Service Board upheld the plaintiff's dismissal and later denied his motion for rehearing.

CONCLUSIONS OF LAW

1. The plaintiff contends that his termination violated due process because he was not given a full adversarial hearing prior to his termination. There is no doubt that the plaintiff had a property interest

in his continued employment. This property interest is created by state law through the Kansas Civil Service Act, K.S.A. 75-2925, *et seq. Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goss v. Lopez*, 419 U.S. 565 (1975). Once state law creates such a property interest, the state cannot deprive the individual of the property without due process of law. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

Part of the minimal procedural requirements of due process in civil service employment cases is the right to a pretermination hearing. *Cleveland Board of Education* v. *Loudermill*, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In *Loudermill*, the U.S. Supreme Court reasoned that pretermination hearings were necessary for two (2) reasons: (1) because of the significance of the individual's interest in retaining his employment, and (2) because of the need for the employee's "side of the case" in order to reach an appropriate decision. 84 L.Ed.2d at 504.

Plaintiff contends that the requirement of a pretermination hearing entitles him to an impartial hearing officer and the right to cross examine the witnesses testifying against him. Plaintiff's contentions, however, clearly ignore the Supreme Court's discussion in *Loudermill* of the type of pretermination hearing required by due process.

> "[T]he pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out that '[t]he formality and procedural requisites for the hearing can vary, depending upon the

> importance of the interests involved and the nature of the subsequent proceedings.' [citations omitted] In general, 'something' less than a full evidentiary hearing is sufficient prior to adverse administrative action. . . .
>
> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."

Loudermill, 84 L.Ed.2d at 506.

Clearly, the Supreme Court indicated that an impartial tribunal and the ability to cross examine witnesses were not constitutionally required in all cases. In *De Sarno v. Department of Commerce*, 761 F.2d 657, 660 (D.C. Cir. 1985) the Court of Appeals interpreted the *Loudermill* requirements and found that an impartial hearing officer was not required at a pretermination hearing when the employee was protected by full evidentiary proceedings after termination. The authorities cited by the plaintiff are not persuasive since many of these cases deal with due process requirements in post-termination hearings.

Using the due process test of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), it is the Court's decision that the pretermination hearing under K.S.A. 75-2529, *et seq.* need not be a full evidentiary hearing. Under statutory civil service procedures, a classified employee is given written notice specifying the reasons for his/her termination and an opportunity to

respond to those charges. While the employee has an interest in retaining his employment, the state has an interest in "quickly removing an unsatisfactory employee." *Loudermill, supra,* 84 L.Ed.2d at . This is especially true in this case where the care and safety of children are involved. Furthermore, the risk of error is reduced by the employee's opportunity to respond to the charges. The employee is also protected by the right to appeal to an impartial tribunal. In addition, the plaintiff had a full evidentiary hearing before the Civil Service Board with the possible remedy of being reinstated with back pay if his termination was found to be unreasonabe. To require a full hearing before termination of a state employee would put a heavy administrative burden on the state which outweighs any benefit received by the employee.

2. Plaintiff's second challenge to his termination is that the defendants failed to comply with K.S.A. 75-2949 which requires a notice of termination "in writing specifically setting forth the reasons therefor." Plaintiff argues that the notice he received did not comply with this specificity requirement.

The Kansas appellate courts have not had an opportunity to interpret this provision of K.S.A. 75-2949 to define the extent of the specificity requirement. The minimum due process requirement of notice has been established as "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford then an opportunity to present their objections."

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). Plaintiff cites *Wade v. Granite City Community Unit School District No. 9*, 218 N.E.2d 19 (Ill. Ct. of App. 1966) as instructive on this issue. In *Wade*, the court held that where a specific reason of dismissal was required, the reason must "fairly appraise the [employee] of the deficiency upon which the [employer] bases its action with sufficient specificity to enable the [employee] to refute the charge." *Id.* at 34.

In reading K.S.A. 75-2949 as a whole, one major reason for the specificity requirement clearly was to give the employee sufficient information to utilize the opportunity to respond to the charges in a meaningful way. Therefore, notice under K.S.A. 75-2949 must be detailed enough to give the employee a reasonable opportunity to know and respond to the charges. After examining the notice of termination and the written response given by the plaintiff at the pretermination hearing, it is clear that the plaintiff had sufficient notice of the first two reasons listed for his termination. The third reason listed for the plaintiff's termination, "conduct detrimental to state service," is somewhat vague since it in no way indicates what type of conduct by the plaintiff was detrimental. Arguably, the third reason is cumulative of the first two reasons. Regardless of the possible vagueness of the third reason, any error was harmless since the evidence presented by the State at the civil service hearing related to the first two reasons in the notice of termination—failure to

cooperate and get along with co-employees and participation in an action that would seriously disrupt the normal operation of YCAA.

For the foregoing reasons, the Court finds that the notice received by the plaintiff was specific enough to meet the requirements of K.S.A. 75-2949.

3. The plaintiff also contends that the Civil Service Board erred by allowing irrelevant and prejudicial testimony to be admitted into the hearing. The admission of this evidence, the plaintiff contends, created a bias against the plaintiff and resulted in a long, expensive hearing. Under K.S.A. 75-2929d (F), the Board is not strictly bound by the rules of evidence. However, the written statement of reasons for termination provided for under K.S.A. 2949 are conclusive of the cause of removal. Other reasons for termination cannot later be raised and evidence as to other reasons for dismissal cannot be presented. *Swezey v. State Dep't. of Social & Rehabilitation Services*, 1 Kan. App.2d 94, 98, 562 P.2d 117, (1977).

After examining the transcript of the hearing and the synopsis of the testimony presented by the plaintiff, the Court finds that the testimony presented by the State at the hearing related to the reasons clearly stated in the proposed dismissal letter—the incident of enticing transfer requests and the plaintiffs inability to maintain satisfactory working relationships with other YCAA personnel. The latter reason was evidenced by testimony of remarks by the plaintiff to other YCAA personnel, testimony regarding the

lack of harmony in the cottage that the plaintiff supervised and a general uncooperative attitude toward various YCAA programs. Even though some of the evidence was obtained by a post-termination investigation, it is still relevant to the reasons for termination stated in the letter. It is clear from the evidence available at the time of the pretermination hearing that there were grounds for the termination. In many situations, the State would not have suffiicent time to conduct its entire investigation before pretermination.

4. Plaintiff also argues that he was denied a fair hearing before the Civil Service Board since the State allegedly failed to provide plaintiff with a bill of particulars as ordered by the Board. On or about November 1, 1984, the Board ordered the State to file a bill of particulars so the plaintiff could adequately prepare his case; the Board specifically excluded any of the State's work product from this order. On November 14, 1984, approximately seven (7) weeks before the hearing, the State sent the plaintiff a document entitled "factual basis and expected witness." The document listed the three reasons for termination and gave specific allegations of conduct relating to each reason. In addition, each allegation was accompanied by a list of names of witnesses and a general statement as to what their testimony would be. Plaintiff contends this statement was not specific enough to allow him to adequately prepare for trial. The Court disagrees. The information provided gave plaintiff adequate notice of the charges

and apprised him of that which he should prepare to defend. Under the law, that is enough.

5. It is plaintiff's argument that the findings of the Board are not substantially supported by the evidence. Plaintiff bases this contention on his claim that the Board believed adverse witnesses who personally gained from his termination and disbelieved the plaintiff's witnesses who were disinterested. In review of administrative action, this Court cannot weigh the credibility of testimony presented at the hearing. *Kansas Assoc. of Public Employees v. Public Service Employees Union*, 218 Kan. 509, 512, 544 P.2d 1389 (1976). The Court's duty is to examine all the evidence presented and determine if the Board's decision is substantially supported by that evidence. After reviewing the hearing transcripts, the Court finds that the decision of the Board upholding the plaintiff's termination is substantially supported.

Affirmed.

/s/ Terry L. Bullock
Terry L. Bullock
District Judge

Dated: (Illegible)

cc: William E. Metcalf, Esq.
Deborah Purce Jones, Esq.

(Seal of District Court)

APPENDIX D

BEFORE THE CIVIL SERVICE BOARD
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF)
GARY E. SCHOOLER)

We received on March 21, 1985, Mr. Metcalf's application for rehearing of the appeal of Mr. Gary E. Schooler to the State Civil Service Board. The application was referred to the members of the Board. A majority of the Board did not take any action to rehear the case; consequently, under K.S.A. 75-2929e, the application is taken as denied.

Chairman Billy S. Sparks submitted the following statement following his review of the application for rehearing:

"ON MOTION FOR REHEARING

"As previously noted by me, the only reason upon which disciplinary or other action could be taken by the appointing authority would be appellant's actions in soliciting persons to call Y.C.A.T. It seems clear that appellant's actions in that regard were specifically stated by the appointing authority in the letter of dismissal. I found from the evidence that appellant did so solicit and that appellant had failed to sustain his burden of proof

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* This application for rehearing was denied and was sent to Petitioner on letterhead. A case caption has been added.

that he did not do so. I found such actions did call for disciplinary measures but as noted in my dissent, I would order a suspension for 6 months rather than termination. In making such findings, I disregarded all other items referred to in the letter of proposed dismissal and in the final letter of dismissal and disregarded all testimony not related to his action in soliciting persons to call Y.C.A.T. There is no reason to reconsider or change my findings.

"Under the Board's procedures, although the burden of proof is upon an appellant, the appointing authority involved is generally required to put on evidence to make a prima facie case. It has been felt that the appellant should not have to introduce testimony until after the appointing authority puts on its evidence. Otherwise, the appellant could not properly dispute charges made. The appointing authority may introduce evidence as to its reasons supporting its final decision and the appellant may introduce evidence as to why the Board might modify the decision of the appointing authority. These matters do not necessarily come in by way of rebuttal. Further, where the evidence is introduced before a hearing examiner over a period of days, whether the evidence comes in by way of rebuttal or otherwise makes no difference. The entire record is considered by each member of the Board and it does not matter in what order the evidence is presented where a hearing examiner has been appointed.

"I would not grant a rehearing for any of the reasons stated in the Motion. There is no reason

to rehear the matter for the introduction of further evidence. It appears that ample opportunity was given to appellant to introduce all relevant evidence. I would grant a rehearing only for the purpose of modification, because I believe that the actions taken by appellant did not justify a dismissal but did justify a suspension. In determining what I believe should be the duration of such a suspension, I considered appellant's regular evaluations which appeared to be more than satisfactory (I did not consider the so-called in-house evaluation), his dedication to helping youth, but also took into account his unwillingness at times to act as a team player as evidenced by the point system matter.—Billy S. Sparks"

Sincerely,

/s/ Lloyd W. Woodburn
Lloyd W. Woodburn,
Acting Secretary
State Civil Service Board

LWW:jh

CERTIFIED MAIL, RETURN RECEIPT REQUESTED,
FOR METCALF AND JONES

APPENDIX E

BEFORE THE CIVIL SERVICE BOARD
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF)
GARY E. SCHOOLER)

ORDER

This matter comes on for review this 28th day of February, 1985 on the appeal of Gary E. Schooler from his dismissal from a Youth Service Worker V position at the Youth Center at Atchison.

The matter comes before Chairman Billy S. Sparks and members Glenn Reed, Earl Bartlett and Leo Carvalho. The hearing of this matter took place on January 9, 10, 23, 24 and 25, 1985 before Daniel J. Carroll, hearing examiner for the Board. At the hearing the appellant appeared in person and by counsel William E. Metcalf and Jo Lynn Justus. The respondent appeared by counsel Deborah Purce Jones and Reid Stacey.

After reviewing the transcribed evidence and argument presented at the hearing, and hearing the report of the hearing examiner, the Board finds the action of the appointing authority dismissing the appellant to be reasonable and that the appellant has failed to meet his burden of showing said action to be unreasonable, Chairman Sparks dissenting.

The reasons for the Board's action was the testimony of Loval Vigola, Gladys Kelly and Michael Kelly, employees at the Youth Center, that they were contacted by the appellant and asked to inquire at the Youth Center at Topeka about transferring to that institution in an effort to discredit the Superintendent of the Youth Center at Atchison. The reason for this action was a proposed staff exchange policy at the institution. The Board found this communication inappropriate and destructive and made in an effort to disrupt the normal operation of the Youth Center.

The Board also considered the testimony of Bob Pepper, psychologist at the Youth Center, that the appellant made disparaging remarks regarding fellow employees in front of a resident at the Youth Center.

The Board also considered the testimony of Superintendent Mark Phelps that the appellant failed to discuss perceived problems in counseling sessions, only taking notes. Again, the Board found these actions disruptive to the normal operation of the institution.

The Board further considered numerous dispositive motions made by the appellant based upon procedural and constitutional irregularities. The Board found the institution complied with the applicable state statutes and that it is without authority to rule on alleged constitutional irregularities. All dispositive motions of the appellant are thus denied.

It Is Therefore Ordered that the action of the

appointing authority dismissing the appellant Gary E. Schooler be affirmed.

Chairman Sparks dissents and files the following dissenting opinion:

> "There is no question in my mind, not only from testimony of many witnesses but from the testimony of the appellant, that if the appellant disagreed with a policy, philosophy, proposal, a rule or regulation, he would not abide by it, would try to get it changed through improper methods and would try to find means to thwart the policy, philosophy, proposal, rule or regulation. I find that at no time was he subject to harassment by his superiors. The alleged harassment was a result of his own actions in trying to thwart the superiors. He likes to make his own rules, doesn't like to follow rules made by others, etc. He is not always a team player.
>
> "However, all of the above generally relates to job performance. Many of the actions complained of by the SRS relate to matters that occurred many, many months ago—and some actions some years ago. These relate to job performance.
>
> "The dismissal can only be based upon the one action taken by appellant with respect to the one proposal in August. There is no question in my mind that the appellant deliberately tried to go around his superiors, deliberately tried to get others to call Topeka, etc. He was asked for input. Instead of merely giving input he violated all standards of proper communications. He again tried to thwart the administration. This is clearly improper.

"As usual, at least so it seems to me, SRS has attempted to base the dismissal on matters other than the one incident. The language used in most of the letter of dismissal includes vague, general matters, not germane or relevant to the actual discharge. The charges (other than the one) are vague and general. Such charges are not only hard to disprove but impossible to even determine what they are based upon. It seems that the SRS just throws in the kitchen sink as a justification and these extra vague charges obfuscate the real reason for termination.

"The only issues are whether appellant took the actions he is charged with as to the proposed staff exchange policy and what should be the disciplinary action as a result.

"The evidence as to his previous actions in attempting to thwart the administration may be admissible as to assisting the Board in determining the proper type and length of disciplinary action. They are not admissible as substantive matters on the issue of the reasons for termination. In fact, all of those matters are related solely to job performance and he was not discharged for job performance and for low evaluations. But as indicated, some of the evidence can be considered by the Board in considering whether the Board should modify the disciplinary action imposed and to what extent.

"I find that he did act improperly with respect to the proposed staff exchange policy and that his actions require that he be disciplined. In considering what action the Board should take on the

appeal, I have examined his evaluations and records and have considered his actions in dealing with policies, philosophies, etc., that he dislikes and his failure to act as a team player.

"I do not believe that his action warrants dismissal. I believe that the action of the appointing authority should have been modified to a six-month suspension without pay. I also believe that he should be counseled with respect to his failures to act as a member of the team. I am of the opinion that the appellant no doubt believes that his philosophy, his reluctance to follow administration's policies, etc. are based upon his personal opinions and that he may have acted in good faith. But he must be a team player. He cannot claim he is being harassed when he is called down for not being a team player. No department can operate properly when one administrator steps out of step. I believe that the State would lose a good employee if he were terminated. However, he should change his attitude in the future.

"Consequently, I feel that a six-months suspension without pay would have been proper.—Billy S. Sparks"

Kansas Civil Service Board
By: /s/ Norman Hanson
Norman Hanson
Secretary

DATED: March 11, 1985

APPENDIX F

BEFORE THE CIVIL SERVICE BOARD
FOR THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF
GARY SCHOOLER
(FACTUAL BASIS AND
EXPECTED WITNESS)

---

1. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidence by your unwillingness to cooperate.

A. Failure to cooperate with the overall treatment plan for students by resisting the treatment program, the level system room restriction and other program policies.

(witness: Bill McDonnell on treatment of

1. Ronnie Hailes, student Potter.
2. Dan Davis on treatment plan for Roger Daniels.
3. Mike Penny on treatment plan of student Standiferd.
4. Mike Driscoll on treatment plan for student Pendergrass.
5. Dr. Kearns on counseling concerning cooperation with treatment plan and policies on restriction and isolation of students.
6. Sam Wheeler on lack of cooperation with

school requests for cottage assistance at school and the point system.

7. Gladys Kelly on failure to cooperate with school generally.
8. Connie Crow on Schooler failure to cooperate with trainee program during her training period.
9. Dr. Ray concerning resistance to trainees generally and nature of training program.

B. Failure to cooperate with supervisors in discussing May, 1984 student transfer (witnesses: Bob Nye, Mark Phelps, Dr. Kearns, and Mr. Penny).

C. Failure to maintain harmonious relationship fellow staff as evidenced by February, 1984 report of drug use in cottage (witness: Sean Flynn, Steve Van Dykes, and Bob Nye).

D. Making repeated derogatory statements concerning other Youth Center Staff in presence of students and others. (witnesses: (1) Bob Pepper on comments about Mr. Ross and Mr. Theurer; (2) Milliard Allen comments about Mr. Phelps; (3) Gladys Kelly comments about entire clinic staff in cottage meeting indicating that staff was "dumb" and "needed to be fired"; and comments concerning Terry Kuhnert's lack of ability).

E. Failure to participate in newsletter (witnesses: Nye and Phelps).

F. Failure to respond to request concerning internal recruitment of staff (Nye and Phelps).

2. Encouraging YSW to call YCAT in Topeka

requesting transfer in order to cause disturbances of normal operation. (witnesses: M. Allen, Mrs. Roper, Gladys Kelley, Mr. Flynn, Mr. Vigola, Mrs. Vigolo, Drs. Kelley, Mr. Flynn, Karla Nolan, Tim Edwards, Sue Watson, and K. Ross).

3. Conduct detrimental to state service.

A. Making comments and bragging on campus, around staff and students concerning Legal activities fighting pit bulls (Gladys Kelley, Bill, and Pat Pepper, D. Buchanan).

B. Making racial comments concerning the detriment of racial-mixing and Blacks as trouble makers within cottage. (G. Kelly, M. Kelley, M. Allen).

APPENDIX G

August 30, 1984

Mr. Mark Phelps
Superintendent
Youth Center at Atchison
Atchison, Kansas 66002

Superintendent Phelps:

I am taking the opportunity to respond in writing, as well as meeting with you on Tuesday, 9-4-84, to the charges leveled against me or reasons for the proposed dismissal.

The first reason listed states:

> "for failing to maintain satisfactory and harmonious relationships with fellow and supervisory employees."

Please note that this aspect of my job duties is covered by my DA 229, and has been for the past 20 months and more. This has been evaluated by Mr. Nye, Dr. Kearns, and yourself as "satisfactory" on my DA 228.

The exception to this is my evaluation of this relationship with only yourself, Dr. Kearns (Program Director), and Mr. Nye (Director of Youth Services). In this circumstance, my relationship is and has been for the past 20 months, one of defense for the sake of job survival in an atmosphere of harrassment and humiliation to accomplish a constructed dismissal.

The second reason listed states:

> "for participation in a deliberate action with the intent of disruption or disturbing the normal operations of the Youth Center at Atchison."

To substantiate this charge, you offer an unsubstantiated statement, which was supposed to have been made by another youth service worker. Whether this statement was made by malicious intent or otherwise, this is a mis-quote of any conversation I had with anyone, concerning the matter of the Universal Staff Exchange Proposal.

I never stated to anyone, any intent to solicit youth service workers to call the Youth Center at Topeka, nor have I done so.

Please see Secretary's Letter 421, which makes available to me, a way to resist these types of policies.

GARY SCHOOLER
Youth Service Worker V
/s/

APPENDIX H

August 29, 1984

Gary Schooler
Youth Service Worker V
Sycamore Cottage
Youth Center at Atchison

Dear Mr. Schooler:

The purpose of this letter is to notify you of your proposed dismissal from your employment with the State of Kansas as a Youth Service Worker V with the Youth Center at Atchison. This proposed dismissal is in accordance with Kansas Personnel Regulation 1-10-6. The proposed effective date of this dismissal will be Wednesday, September 5, 1984.

The reasons for your proposed dismissal are as follows:

1. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidenced by your continued and pervasive unwillingness to cooperate with staff including, but not limited to, the following: KSA 75-2949a (4)

   Director of Training and Staff Development, YCAA
   Program Director, YCAA
   Director of Youth Services, YCAA
   Director of Education, YCAA
   Chief Psychologist, YCAA

Chief Social Worker, YCAA
Other Youth Service Workers

2. Participation in a deliberate action that would seriously disrupt or disturb the normal operation of the Youth Center at Atchison as attested to by another Youth Service Worker in the following statement: KSA 75-2949b (6)

> "Of my own personal knowledge, I received a phone call at my residence on the late afternoon of August 20th. This call came from Mr. Schooler, he was informing me that we were being transferred on September 18th. *
>
> At that time he said he was asking his staff and Glenice (Schooler, spouse of Mr. Schooler) was asking her staff to call YCAT asking for lateral transfers. He stated that if enough people call that someone will be saying something to Gene (Supt. Wilson). Then maybe the word will get to Coates and he will attempt to find out what is going on up here."

3. Personal conduct detrimental to state service which could cause undue disruption of work and endanger the safety of other staff and students. KSA 75-2949b (16)

This proposed dismissal is being initiated in accordance with Article 75-2949 of the Kansas Civil Service Act which states that an appointing authority may

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* Apparently referring to a Draft Proposal entitled "Universal Staff Exchange" which was submitted to all HYSW's for their response and evaluation.

dismiss any permanent classified employee when the appointing authority considers that the good of the service will be served thereby.

Before a final decision is made on the proposed dismissal, you have the opportunity to appear before me or respond in writing, or both, concerning your proposed dismissal. This opportunity for you to reply and/or appear shall be at the Superintendent's Office on Tuesday, September 4, 1984, at 8 AM, at which time you may present your reasons or explanations as to why your dismissal should not take place. You will be notified as to my decision on the issue of the proposed dismissal on or before Tuesday, September 4, 1984, by 5 PM.

Upon receipt of this letter of proposed dismissal you are hereby placed on leave without pay and relieved of your employment duties until the conclusion of all action relative to your proposed dismissal.

Sincerely yours,

Mark S. Phelps
Superintendent

MSP:vj

cc: State Division of Personnel Services
Director, SRS Division of Personnel Services
Personnel File
Director Nye

I acknowledge receipt of this letter on 8/29/84.
signed

APPENDIX I

K.S.A. 75-2949 as it existed at the time of Petitioner's termination stated as follows:

(a) An appointing authority may dismiss or demote any permanent employee in the classified service when the appointing authority considers that the good of the service will be served thereby, and for disciplinary purposes may suspend without pay a permanent classified employee for a period not to exceed 30 calendar days, but no permanent employee in the classified service shall be dismissed, demoted or suspended for political, religious, racial or other nonmerit reasons.

(b) Prior to dismissal, demotion or suspension of a permanent employee in the classified service, the appointing authority shall furnish the employee by certified mail, return receipt requested, or by personal delivery, a statement in writing specifically setting forth the reasons therefor. A copy of such statement shall be furnished immediately to the director. This statement shall contain notice of the proposed dismissal, demotion or suspension and shall specify the proposed effective date thereof. Except as otherwise provided in the Kansas civil service act, a proposed suspension, demotion, or dismissal shall become effective no less than three calendar days nor more than 10 calendar days following the date the notice of such proposed suspension, demotion, or dismissal is personally delivered to the employee or deposited with the post office as certified mail. If in the opinion of the appointing authority conditions warrant, the appointing authority may

relieve the employee of duties or change the duties of the employee during such period. If the employee is relieved from duty during such period, the employee may be continued in pay status, or placed on leave of absence without pay by the appointing authority. In the statement proposing suspension, demotion or dismissal, the appointing authority shall offer the employee who is proposed to be suspended, demoted or dismissed an opportunity to reply in writing, or appear in person, or both, before the appointing authority or a designated representative of the appointing authority, on the issue of the proposed suspension, demotion, or dismissal, prior to the time such suspension, demotion, or dismissal is specified by the notice to become effective. The statement shall specify the date, time, and place, by, or at which, the employee may reply in writing or appear, or both.

(c) Upon request by the employee, or upon the initiative of the appointing authority, the appointing authority, with the approval of the director of personnel services, may extend the time for reply or appearance, or both, if the circumstances warrant. The proposed suspension, demotion or dismissal shall not become effective until after the extended period has expired or the effective date given in the notice, whichever is later.

(d) Following the employee's response to the opportunity to reply to the proposed action, or upon expiration of the time for such reply, if no reply is made, the appointing authority, or the designee of the appointing authority, shall notify the employee of the final decision on the proposed

action. Such notice shall be in writing and delivered by one of the methods authorized for delivery of a notice of proposed suspension, demotion, or dismissal. This final notice of decision by the appointing authority or the designee of the appointing authority, to suspend, demote or dismiss the employee shall inform the employee of the employee's right to appeal the decision to the state civil service board within 30 calendar days after the effective date of the action.

(e) At any time prior to the effective date of the proposed suspension, demotion, or dismissal or, if an appeal is taken to the state civil service board, at any time prior to the final decision of the board, the appointing authority, or the designee of the appointing authority, with the approval of the director of personnel services, may withdraw or modify the action proposed to be taken or taken against the employee.

(f) Any permanent employee finally dismissed, demoted or suspended, may request in writing within 30 calendar days after the effective date of the dismissal demotion or suspension, a hearing from the state civil service board to determine the reasonableness of such action, and the board shall grant the employee a hearing within 45 calendar days after receipt of such request. At the hearing the burden of proof shall be upon the employee to establish that the appointing authority did not act reasonably in taking such action.

(g) No employee shall be disciplined or discriminated against in any way because of the employee's proper use of the appeal procedure.

(h) A permanent employee who is demoted pursuant to this section need not meet the qualifications for the class of positions to which demoted if the appointing authority determines that the employee can reasonably be expected to perform satisfactorily the duties of the position to which the employee is demoted. A permanent employee who is demoted pursuant to this section shall have permanent status in the class to which demotion is made, effective on the date of the demotion.

(i) In case of a situation in which the possibility of proposing dismissal, suspension or demotion of a permanent employee is indicated, but where the appointing authority needs time to conduct an investigation before proposing such action, or in a situation where immediate removal of an employee from such employee's job is needed to avoid disruption of work, or for the protection of persons or property, or for a similar reason, the appointing authority may relieve the employee of duties or change the duties of the employee for a limited period and keep the employee in pay status. The secretary of administration shall provide by rules and regulations, adopted pursuant to K.S.A. 75-3706, procedures to be followed in such cases.

APPENDIX J

K.S.A. 75-2929d as it existed at the time of Petitioner's termination stated as follows:

> (a) The state civil service board shall hear appeals taken to it pursuant to K.S.A. 75-2940, 75-2949 and 75-3747, or any amendments thereto, concerning demotion, dismissal or suspension of a permanent employee in the classified service, or concerning refusal to examine an applicant or to certify a person as eligible for a job class.
>
> (b) When an appeal is taken to the board, the board shall establish a time and a place for the hearing which shall be held within 45 days after receipt of requests for the appeal. The board shall notify the person bringing the appeal and the appointing authority or other person whose action is being reviewed of the time and the place of the hearing, within 14 days prior to such hearing, by certified mail, return receipt requested. Each party at the hearing shall have the right to be heard, to be represented by a person of the party's own choice, to present evidence and to cross examine witnesses.
>
> (c) The board, or the director of personnel services when authorized by majority vote of the board, may take deposition of witnesses or may issue subpoenas to compel the attendance of witnesses at such place as may be designated in this state and to compel the production of books and papers pertinent to any inquiry or investigation

authorized by this act. Subpoenas shall also be issued at the request of the parties to the proceedings other than the board and the director. The board or any member thereof, or the director when authorized by the board, may administer oaths and take testimony. The board or the director may examine such public records as may be required in relation to any matter which the board has authority to investigate. All officers and other persons shall attend and testify when required to do so by the board, or by the director when authorized by the board.

(d) In case of the refusal of any person to comply with any subpoena issued under this section or to testify to any matter regarding which the person may be lawfully interrogated, the district court of any county, on application of any one of the members of the board, or on application of the director when authorized by the board, may issue an order requiring such person to comply with the subpoena and to testify, and any failure to obey the order of the court may be punished by the court as a contempt thereof. Unless incapacitated, the person placing a claim or defending a privilege before the board shall appear in person and may not be excused from answering questions and supplying information, except in accordance with such person's constitutional rights and lawful privileges.

(e) Each person not in the classified or unclassified service who appears before the board or the director by order shall receive for such person's attendance the fees and mileage provided

for witnesses in civil actions in the district court, which fees and mileage shall be audited and paid by the state upon presentation of proper vouchers. Witnesses subpoenaed at the request of parties other than the board or the director shall be entitled to compensation from the state for attendance or travel only if the board certifies that the testimony of such witnesses was relevant and material to the matter investigated.

(f) The board and the director, in conducting hearings and investigations in accordance with the provisions of this act, shall not be bound by the technical rules of evidence.

APPENDIX K

K.S.A. 75-2929e as it existed at the time of Petitioner's termination stated as follows:

(a) The state civil service board within thirty (30) days after hearing and consideration of the evidence shall affirm, modify or reverse a case on its merits and order any other action it deems appropriate.

(b) All final orders of the board shall be in writing signed by the chairperson or secretary, shall state the findings of the board and reason for the order and shall be binding upon the parties thirty (30) days after issued unless a rehearing is requested under subsection (c). Any member of the board may submit a minority or supplemental report which shall be filed as a matter of reference. All final orders of the board shall be permanently filed by the secretary and copies thereof shall be mailed to the person who brought the appeal and to the appointing authority or other person who was a party to the appeal by certified mail, return receipt requested.

(c) Within ten (10) days after the date of the board's final order, any party aggrieved by the final order of the board may apply for a rehearing in respect to any matter determined therein. Within ten (10) days of the date of filing of an application for rehearing, the application shall be granted or denied or continued, but any such continuance shall not exceed thirty (30) days from

the date of the order of continuance. If the rehearing is not granted or continued within such ten-day period it shall be taken as denied. If a rehearing is granted, the matter shall be determined by the board within thirty (30) days after the rehearing is granted and the rehearing shall be conducted *de novo*. No appeal shall be taken from any final decision of the board by any party unless such party has made application for a rehearing as provided by this section. An application for rehearing shall set forth specifically the ground or grounds on which the applicant considers all or any portion of the final order or decision to be unlawful or unreasonable. In any subsequent appeal or proceeding in any court, no party shall urge or rely upon any ground not set forth in the application for a rehearing. A decision made after a rehearing which abrogates, changes or modifies the original decision, shall have the same force and effect as the original decision.